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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. ROCKY EUGENE HOLMES, Defendant and Respondent.	E066458 (Super.Ct.No. CR62899) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Michael A. Hestrin, District Attorney, Donald W. Ostertag, Deputy District Attorney, for Plaintiff and Appellant.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from the superior court's order granting defendant and respondent Rocky Eugene Holmes's petition to recall his sentence under Proposition 47. (Pen. Code, § 1170.18.)[1] We affirm.

FACTS AND PROCEDURE

On May 5, 1995, defendant entered a bank in Riverside and cashed or attempted to cash a forged check made out to him in the amount of $450.

On June 14, 1996, the People filed a complaint charging defendant with forgery (§ 475a) and second degree burglary (§ 459). The People alleged defendant had three prison term priors (§ 667.5, subd. (b)) and two "strike" priors (§§ 667, subds. (c) & (e), 1170.12, subd. (c)).

Defendant was convicted as charged. On March 21, 1997, the trial court sentenced defendant to 25 years to life on both counts, to run concurrently, with one year for each of the prior prison terms, also to run concurrently. On July 21, 2014, defendant was resentenced to nine years in prison under Proposition 36.

On October 29, 2015, defendant filed a petition for resentencing under section 1170.18, asking the court to reduce both convictions to misdemeanors. The People filed its opposition, opposing resentencing for the second degree burglary, but stating more information was needed on the total amount of the check(s) for the forgery count.

The court held a hearing on the matter on June 17, 2016. The People conceded the forgery should be reduced to a misdemeanor because it was under $950. However,

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[1] Section references are to the Penal Code unless otherwise indicated.

argued defendant does not qualify for the sentence reduction because (1) the bank is not a commercial establishment, and (2) defendant entered the bank intending to commit felony identity theft in violation of section 530.5, rather than larceny. The court granted the petition as to both counts, reasoning that a bank is a commercial establishment and the check was for $450.

This appeal by the People followed.

DISCUSSION

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhood and Schools Act, which became effective November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, sections 1170.18 and 459.5. Section 1170.18 creates a process permitting persons previously convicted of crimes as felonies, which might be misdemeanors under the new definitions in Proposition 47, to petition for resentencing. (*Rivera*, at pp. 1091-1092.)

Section 1170.18, subdivision (f), provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." Subdivision (g) of section 1170.18 provides: "If the application

satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

Section 459.5 was among the provisions added by Proposition 47. It reduces certain second degree burglaries to misdemeanors by defining them as "shoplifting," that is, "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).)

We review a trial court's "legal conclusions de novo and its findings of fact for substantial evidence." (*People v. Trinh* (2014) 59 Cal.4th 216, 236.) The interpretation of a statute is subject to de novo review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) "In interpreting a voter initiative like [Proposition 47], [the courts] apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.' " (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) "In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative

construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

The People argue, as they did in the superior court, both that defendant entered the bank with the intent to commit felony identity theft, and that the bank was not a "commercial establishment" within the meaning of section 459.5.

In the second amended information, the People charged that on May 5, 1995, defendant "willfully and unlawfully enter[ed] a certain building . . . with intent to commit theft and a felony" in violation of section 459 (count 2). In count 1, the People charged defendant with forgery in violation of former section 475a, in that "he did willfully and unlawfully have in his possession a completed check . . . in the sum of $450.00, with the intent to utter and pass the same and to permit, cause, and procure the same to be uttered and passed, with the intent to defraud." Both of the charges are interrelated in that defendant entered the bank and attempted to cash a forged check in the amount of $450. The People did not charge identity theft. Defendant entered a plea to counts 1 and 2, forgery and second degree burglary. Identity theft was not placed in issue at the time of the plea.

In *People v. Abarca* (2016) 2 Cal.App.5th 475, 483-484 (*Abarca*), we relied on the convicted offenses, not offenses that could have been filed but were not, such as identity theft.[2] We noted that Proposition 47 provided a petitioning procedure by which an

[2] The Supreme Court granted review in *Abarca, supra*, 2 Cal.App.5th 475 on October 19, 2016, S237106. Under a recent amendment to rule 8.1115 of the California

[footnote continued on next page]

offender could seek resentencing on felony convictions that qualified under Proposition 47. Defendant here was not convicted of identity theft. We will not look behind defendant's actual convictions to find an uncharged crime that would make him ineligible. (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1427-1428; *People v. Maestas* (2006) 143 Cal.App.4th 247.)

On review, we indulge in every presumption to uphold the judgment and look to the appellant to show error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) For the reasons stated in *Abarca, supra*, 2 Cal.App.5th 475, we reject the People's contention that defendant is ineligible for resentencing.[3]

The People also contend that defendant is not entitled to resentencing because a bank is not a "commercial establishment" within the meaning of section 459.5. That term is not defined in the Penal Code, and the People urge us to adopt a commonsense meaning, which would be its plain, ordinary meaning. The People contend that the voters intended to limit shoplifting to theft crimes of establishments that have goods for sale.

In *Abarca, supra*, 2 Cal.App.5th at pages 481-482, we rejected the same argument, noting that the term "commerce" is normally defined as the exchange of goods and services, and the term "establishment" is defined as a place of business. We explained:

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Rules of Court, we may rely on the Court of Appeal's decision as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

[3] We note that the meaning of larceny as used in section 459.5 is on review by the California Supreme Court. (*People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171.)

"Banks satisfy this definition. Bank customers use banks to deposit and withdraw funds in exchange for fees. In the context of approving banks' ability to collect fees from non-depositors who use their automatic teller machines, the [United States] Court of Appeals for the Ninth Circuit noted '[t]he depositing of funds and the withdrawal of cash are services provided by banks since the days of their creation. Indeed, such activities define the business of banking.' (*Bank of America v. City & County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 563.) Thus, a [bank] provides financial services in exchange for fees, and is therefore a commercial establishment within the ordinary meaning of that term." (*Abarca*, at pp. 481-482.) A bank, therefore, is a financial services business. We follow our precedent in *Abarca*, and reject the People's argument. (*Ibid*.)

DISPOSITION

Affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

SLOUGH
J.